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IN THE

Supreme Court of the United States

October Term, 1941.

No. 795.

PLOW CITY STEAMSHIP COMPANY, CLAIMANT OF THE STEAMSHIP "PLOW CITY" (Respondents-Appellee in the Court Below),

Petitioner,

v.

TEXAS GULF SULPHUR COMPANY, INCORPORATED (Libellant-Appellant in the Court Below),

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

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Petitioner,

v.

TEXAS GULF SULPHUR COMPANY, INCORPORATED (LIBELLANT-APPELLANT IN THE COURT BELOW),

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

STATEMENT OF THE CASE.

On October 10, 1937, the respondent, Texas Gulf Sulphur Company, Inc., shipped and placed on board the Steamship "Plow City", at Galveston, Texas, a cargo of sulphur, in bulk, for carriage to Norfolk, Va., and delivery there in like good order and condition as when received. A few days after leaving Galveston sea water entered the vessel's No. 1 cargo hold, where a portion of the respondent's cargo had been stowed, in such quantities as to put her down at the head; and after turning into Savannah, where an emergency pump was installed in the vessel's forepeak, and a temporary certificate of seaworthiness was

issued to her, she continued her voyage to Norfolk, and there delivered her cargo of sulphur to the respondent in a damaged condition.

The bill of lading issued by the master of the vessel (see copy attached to the petition, pp. 27 and 28) was an undertaking to deliver the respondent's cargo at Norfolk, "in like good order and condition" as when received at Galveston, subject to certain excepted causes of loss or damage (which did not include unseaworthiness), as the same are expressly set forth in the bill of lading, and as contained in a certain charter party, incorporated in the bill of lading by reference, in which the owners of the vessel expressly warranted that she was "tight, staunch and strong, and in every way fitted for the voyage", and was "to be maintained in such condition by the owners during the voyage".

The respondent, alleging that its cargo of sulphur had been damaged because of the unseaworthiness of the "Plow City", filed a libel against the vessel, *in rem,* for the recovery of its loss. The District Court dismissed the libel, upon the ground that the "Plow City" was seaworthy, and that the respondent's loss had resulted from a peril of the sea, for which the vessel was not answerable. The findings and conclusions of the District Court, as set forth by it in its opinion (Transcript of Record, page 4) were as follows, *italics supplied:*

> "The libellant bases its claim upon the allegation that the vessel was unseaworthy in that the threads on the No. 1 sounding pipe and cap were worn and defective so that the cap was misplaced during the voyage, permitting sea water to enter into the No. 1 bilge, which was below and to the rear of the No. 1 hold, and from there into the hold through drain open-

ings between the hold and the bilge. Libellant also alleges that the gaskets on the man-hole cover between the bottom of the hold and the chain locker cofferdam were defective and permitted water to enter the hold from the cofferdam which had become flooded during the voyage. Other possible sources were described by the witnesses but appear to have been eliminated by both parties in the course of the trial and arguments."

. . . . . .

"From all of the testimony and particularly the testimony of the third mate, we are convinced that the sounding pipe and cap in question were not *so defective* as to render the vessel unseaworthy in that respect. *It is conceivable* that through exposure and corrosion the threads on the pipe parts *might* become gradually less effective, but we do not think the subsequent rethreading of the pipes is conclusive evidence that they were *so worn* as to be useless at the time of the accident, and, in making general repairs, it is *quite probable* that many parts were renewed or improved before they became defective to the point of rendering the vessel unseaworthy."

. . . . . .

"It *would appear* that the sounding pipe cap on the 'Plow City', like that involved in the case of The Newport News (199 Fed. 968), became loosened and displaced by the straining of the vessel, which fact was not discovered because of the difficulty of inspection during the two-day storm."

. . . . . .

"The violence of the sea in the present case was sufficient to account for the displacement of the sounding pipe cap and the failure of the crew to discover it before damage occurred, and therefore constituted a peril of the sea."

The Circuit Court of Appeals for the Third Circuit reversed the decree of the District Court, and remanded the cause with directions to ascertain the damages sustained by the respondent, and to enter a final decree for such sum, for the following reasons, *italics supplied* (Transcript of Record p. 159):

> "The evidence shows that on the afternoon of October 17th the mate went forward and discovered that the sounding pipe cap of the No. 1 sounding pipe within the mast-stand was missing; that the mate stopped up the pipe with a plug of wood and the vessel proceeded to Savannah. The water could have entered the No. 1 bilge through the No. 1 sounding pipe and overflowed thence into the No. 1 hold through the open grating between the bilge and the bottom of the hold. There was also evidence that the gaskets on two manhole covers were defective, which would have permitted water to come into the hold from a cofferdam which had become flooded. *During the height of the storm, according to the ship's log as testified to by the captain, the wind velocity was Force Eight on the Beaufort Scale. This was at a rate from 34 to 40 miles an hour and the seas were high.*
>
> "The repairs made to the Plow City at Chester included the rethreading of sounding pipes including the sounding pipe to the No. 1 bilge."
>
> . . . . . .
>
> "The question presented for our determination is a very simple one. *There was a warranty by the shipowner that the Plow City was seaworthy at the beginning of the voyage. A vessel which takes in such quantities of water as to put her down at the head a few days after leaving port cannot be presumed to have been seaworthy when she left port.* That fact must be affirmatively proved. The Edwin I. Morrison, 153 U. S. 199, 210; The Medea, 179 Fed. 781. The

owner therefore had the burden of proving that the Plow City was seaworthy when she departed from Galveston. The learned District Judge found that the vessel was seaworthy, *but this was based upon nothing more than his conjecture that the No. 1 sounding pipe and its cap '* * * were not so defective as to render the vessel unseaworthy * * *'*. He went on to say, 'Whether the cap was displaced by the motion and straining of the vessel, or was missing due to the failure of some person to replace, is unimportant for present purposes inasmuch as both causes come within the exemptions of the Harter Act and the charter party agreement'. There is no evidence that any person failed to replace the missing cap. On the other hand *there is testimony tending to prove that the thread upon the No. 1 sounding pipe and the thread of its cap were defective* so that the cap was dislodged by the pitching of the vessel, permitting water to enter the No. 1 bilge through the sounding pipe. This defective condition of threads upon pipe and cap, if it existed at all, must have existed at Galveston where the vessel lay only a few days before encountering the storm. *If a shipowner warrants his vessel to be 'tight, staunch, strong, and in every way fitted for the voyage,' his vessel must be so equipped as to withstand the buffeting of a forty mile gale.* The Edwin I. Morrison, supra, at p. 210;The Medea, supra, at pp. 787 to 792, and authorities therein cited. Under the circumstances the loss of the cap may not be attributed to the perils of the sea and the shipowner cannot avail itself of the exceptions to liability as set up in the bill of lading and the charter party."

II.
ARGUMENT.

(a) The Decision Rendered by the Circuit Court of Appeals for the Third Circuit Is Not in Conflict Either With the Decision of the Circuit Court of Appeals for the Fifth Circuit in The Point Chico, 122 Fed. (2d) 1, or With the Decision of This Court in Commercial Molasses Corp. v. New York T. B. Corp., 86 L. ed. Adv. Ops. 125.

The question presented to the Circuit Court of Appeals for the Third Circuit was whether the "Plow City" was seaworthy when she left Galveston; and whether a vessel is seaworthy is a question which depends for its answer upon the facts peculiar to the case.

In *The Point Chico,* 122 Fed. (2d) 1, the Circuit Court of Appeals for the Fifth Circuit held that the burden was on the ship-owner to show that the vessel was seaworthy at the commencement of her voyage, and, on the facts peculiar to the case before it, affirmed the conclusion of the District Court that (a) the vessel was seaworthy when she left her last loading port, and (b) that the damage to her cargo had been caused by fault or error in navigation or management for which the ship-owner was not responsible under the provisions of the Harter Act.

In the instant case, the Circuit Court of Appeals for the Third Circuit likewise held that the owner of the "Plow City" had the burden of proving that she was seaworthy when she left Galveston; and, on the facts peculiar to the case, reached the further conclusion that this burden had not been sustained, and that the respondent was therefore entitled to recover its full damages.

The petitioner's contention that the decision of the Circuit Court of Appeals for the Third Circuit is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit, is therefore, we respectfully submit, utterly untenable.

The petitioner asserts that the "Plow City" was a private carrier; and that in holding that the burden rested upon the petitioner of proving that she was seaworthy, the Circuit Court of Appeals for the Third Circuit rendered a decision in conflict with the decision of this Court in *Commercial Molasses Corp. v. New York T. B. Corp.*, 86 L. ed. Adv. Ops. 125. But the finding made by the Circuit Court of Appeals, and to which the petitioner has taken no exception, was:—that the "Plow City" had undertaken to deliver the respondent's sulphur at Norfolk, Va., "in the same good order and condition in which it was received".

The "Plow City", therefore, by undertaking to deliver the respondent's shipment "in the same good order and condition in which it was received", assumed the obligation of a common carrier, and, as such, had the burden of proving that she was seaworthy when she began her voyage.

The Edwin I. Morrison, 153 U. S. 199, 38 L. ed. 688;

The Commercial Molasses Corp. v. New York T. B. Corp., supra.

But even assuming that the "Plow City" was a private carrier, and had not assumed the obligation of a common carrier, then, as bailee of the respondent's cargo, it was the petitioner's duty to come forward with the information available to it, and the Circuit Court of Appeals for the Third Circuit, as the trier of the facts, when the case was before it, *de novo,* on appeal, was free to assume

that the vessel was unseaworthy, if that was a rational inference from the proven facts, as this Court likewise held in *Commercial Molasses Corp. v. New York T. B. Corp., supra.* The petitioner sought to establish that the "Plow City" was seaworthy; but the uncontradicted evidence showed that, during the height of the storm which the vessel encountered after leaving Galveston, the wind velocity was Force Eight on the Beaufort Scale, i. e. from 34 to 40 miles per hour, and that, within a few days after leaving port, sea water entered and flooded the vessel's No. 1 cargo hold in such quantities as to put her down at the head. The rational inference inference from the proven facts, therefore, was that the vessel could not have been seaworthy when she left port, and that was the conclusion reached by the Circuit Court of Appeals for the Third Circuit, which held (Transcript of Record, page 162):—

> "A vessel which takes in such quantities of water as to put her down at the head a few days after leaving port can not be presumed to have been seaworthy when she left port. * * * If a ship-owner warrants his vessel to be tight, staunch, strong and in every way fitted for the voyage, his vessel must be equipped to withstand the buffeting of a forty-mile gale. The Edwin I. Morrison, supra, at page 210; the Medea, supra, at pp. 787 to 792, and authorities therein cited. Under the circumstances the loss of the cap may not be attributed to the perils of the sea and the shipowner can not avail itself of the exceptions to liability as set up in the bill of lading and the charter party".

In *The Edwin I. Morrison, supra,* this Court held, p. 211:—

> "Perils of the sea were excepted by the charter party, but the burden of proof was on the respondent to show that the vessel was in good condition and suitable for the voyage at its inception".

(b) In Reaching Its Conclusions, the Circuit Court of Appeals for the Third Circuit Did Not Depart From the Accepted and Usual Course of Judicial Proceedings.

The Circuit Court of Appeals for the Third Circuit held that the trial judge had not properly complied with Rule 46½ of the Admiralty Rules of this Court, and had improperly allowed the proceedings before him to be unduly protracted through delays, adjournments and postponements for which he was responsible; but it did not, for either of these reasons, reverse his findings and conclusions, and direct a judgment to be entered in favor of the respondent, as the petitioner alleges.

Rule 46½ of the Admiralty Rules of this Court requires "the Court of first instance", to find the facts specially and to state separately its conclusions of law thereon; and in the instant case, the Court of first instance filed an extended opinion wherein it set forth the facts as found by it, and its conclusions of law thereon, although, with respect to the specific findings of fact and conclusions of law requested by the petitioner, the trial Judge contented himself by stating that he affirmed them "insofar as they are not at variance with the findings and discussion of facts herein." The Circuit Court of Appeals for the Third Circuit likewise filed an extended opinion wherein it set forth its findings of fact and conclusions of law thereon.

The case, therefore, is in no way analogous to *Panama Mail Steamship Company v. Vargas,* 281 U. S. 670, 74 L. Ed. 1105, in which the District Court entered a decree awarding damages without delivering any opinion, or making any findings of fact.

(c) The Respondent Was Entitled to File, in Its Own Name, a Libel Against the "Plow City".

The respondent was insured, but did not receive from its underwriter, Fidelity-Phoenix Fire Insurance Company, payment of its loss within the terms of its policy:— it received from its underwriter a loan, which was repayable only to the extent of any net recovery which it might make from any third party, as particularly set forth in its receipt therefor, a copy of which appears in the Transcript of Record, page 130.

The agreement between the respondent and its underwriter was in all respects similar to the agreement with respect to which this Court, in *Luckenbach v. McCahan Sugar Refining Co.*, 248 U. S. 139, 63 L. ed. 170, said:—

> "Agreements of this nature have been a common practice in business for many years. * * * The carrier insists that the transaction, while in terms a loan, is in substance a payment of insurance; that to treat it as if it were a loan is to follow the letter of the agreement and to disregard the actual facts; and that to give it effect as a loan is to sanction fiction and subterfuge. But no good reason appears either for questioning its legality or for denying it effect. * * * Whether the transfer of money or other things shall operate as a payment is ordinarily a matter which is determined by the intention of the parties to the transaction."

In the Luckenbach case, therefore, this Court upheld the transaction between the underwriter and its assured, as a loan, in accordance with the intention of the parties as expressed in their agreement; and in the instant case, likewise, the agreement between the respondent and its underwriter clearly expressed the intention of the parties that

the money which was being paid by the underwriter was advanced by it, and was received by the respondent as, a loan.

The Luckenbach decision was rendered by this Court in 1918, and definitely resolved whatever doubt may theretofore have existed with regard to the legality and effect of what this Court recognized had been a common practice in business for many years; and in upholding and giving effect to the agreement between the respondent and its underwriter in the instant case, the Circuit Court of Appeals for the Third Circuit rendered a decision in accordance with the law as established by this Court.

Moreover, since the respondent's underwriter did not make an unconditional payment on its policy of the amount of its insurance, it could not have maintained an action in its own name against the "Plow City", in the exercise of what might otherwise have been its right of subrogation. In *Judd & Root v. N. Y. & T. S. S. Co.*, 128 Fed. 7, the insurance company had paid the plaintiffs the full amount of their loss, as a loan, and it was the defendant's contention that the insurance company was therefore the real party and plaintiff in interest. The Circuit Court of Appeals for the Third Circuit held:—

> "The doctrine of subrogation has no relation to the question to be here determined. It cannot be invoked until the insurance company, as the one secondarily liable, has absolutely and unconditionally paid in full the amount of the indemnity for the loss in question. It would have then, and only then, under this doctrine, a right to assert in its own favor the rights and remedies of the insured."

III.

REASONS WHY THE PETITION SHOULD BE DENIED.

The question presented, i. e., whether the "Plow City" was seaworthy, was one of simple fact, to be determined by the evidence, and did not involve the interpretation of any Federal statute, nor any matter of public interest or importance. The decision rendered by the Circuit Court of Appeals for the Third Circuit, moreover, was not in conflict with the decision of any Circuit Court of Appeals on the same matter; it did not decide any important question of general law in a way which can in any wise be said to have probably been untenable or in conflict with the weight of authority; it did not decide an important question of Federal law which has not been, but should be, settled by this Court; it did not decide a Federal question in a way which can in any wise be said to be in conflict with the applicable decisions of this Court; and it did not in any wise depart from the accepted and usual course of judicial proceedings, nor did it in any wise sanction such a departure by the lower Court, so as to call for an exercise by this Court of its power of supervision.

We therefore respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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